

MAR 24 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDDIE JAY JUSZCZAK,

Defendant - Appellant.

No. 08-15073

D.C. Nos. CV-05-00786-JMR
CR-02-01403-JMR

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Submitted March 18, 2009^{**}

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Federal prisoner Eddie Jay Juszcak appeals from the district court's denial of his 28 U.S.C. § 2255 motion. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Juszczak contends that he received ineffective assistance of counsel when his trial counsel failed to challenge at sentencing the characterization of his prior solicitation offense as a controlled substance offense within the meaning of U.S.S.G. § 4B1.2(b). Because this issue is meritless, counsel's failure to raise the issue does not constitute ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *see also United States v. Shumate*, 329 F.3d 1026, 1030 (9th Cir.), *amended by* 341 F.3d 852 (9th Cir. 2003).

We reject the government's contention that this issue was previously raised on direct appeal. *Cf. United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985).

AFFIRMED.